No. 09-56999

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEDELITO TRINIDAD Y GARCIA,

Petitioner/Appellee,

v.

MICHAEL BENOV, Warden,
Metropolitan Detention Center - Los Angeles,

Respondent/Appellant.

On Appeal From the United States District Court
For the Central District of California

EN BANC BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

Orders:

Rules:

Legislative Materials:

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INTRODUCTION

This case challenges the longstanding rule that the federal courts will not review and override extradition surrender determinations made by the Secretary of State. Here, petitioner Hedelito Trinidad y Garcia ("Trinidad") urges the Court to overturn an expert evaluation and decision made by the Secretary of State that Trinidad can properly be surrendered for extradition to the Republic of the Philippines in compliance with the United States' obligation not to extradite an individual to a country where

it is more likely than not that he will be tortured. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention"), Art. 3 (S. Treaty Doc. No. 100-20 (1988); U.S. Dep't of State, *Treaties in Force*, 458 (2009)).[1]

Judicial review and override of the Secretary's determinations regarding the likelihood of torture are not required or authorized by the Torture Convention, are precluded by statute, are inconsistent with the long-standing Rule of Non-Inquiry concerning the Secretary's decisions in extradition surrender matters, and are inappropriate given the careful process and expert review that the Secretary accords such decisions. Additionally, the lengthy delays caused by adding an additional layer of legal proceedings raising this sort of Torture Convention claim following the Secretary's surrender determination, on top of the successive habeas proceedings pursued by fugitives could, unless stopped, continue to raise serious obstacles to a functioning U.S. extradition system and the ability of the United States to meet its extradition treaty responsibilities.

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[1] The Torture Convention and its relevance to this case are discussed in detail below.

In this instance, the United States has been attempting for more than four years to extradite Trinidad to the Philippines to stand trial there on a kidnap-for-ransom charge. Trinidad has aggressively fought his extradition, claiming that he will be tortured if he is extradited to the Philippines. After the district court denied Trinidad's first habeas petition, the Secretary of State carefully considered Trinidad's torture allegations against the Philippine government, and determined that they did not preclude Trinidad from being surrendered lawfully to Philippine law enforcement officials, consistent with U.S. obligations under the Torture Convention.

Trinidad then brought this second habeas petition, asking the courts to review and overturn the Secretary of State's determination about conditions in the Philippine judicial system. But that type of expert determination by the Secretary is not justiciable under the long-established Rule of Non-Inquiry, which has been applied by this Court and its sister Circuits on numerous occasions involving extraditions and attacks against the integrity of foreign justice systems. This principle is particularly appropriate in this context because the Department of State

has a robust process for evaluating claims whether an extradition surrender would be inconsistent with U.S. obligations under the Torture Convention.

The Government is ***not*** arguing that the Secretary of State has discretion to surrender a fugitive who more likely than not will be tortured, even if foreign policy interests at the time would be served by an extradition. The United States recognizes its binding treaty obligation not to extradite a detainee if torture is more likely than not to occur in the receiving state. See Torture Convention, Art. 3. See also Reply Brief for the Federal Parties, at 23, in *Munaf v. Geren*, Nos. 07-394 & 06-1666 (Sup.Ct.); *cf. Munaf v. Geren*, 553 U.S. 674, 702 (2008) (noting that "this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway").

Rather, our position is that where appropriate procedures are in place and the Secretary has followed those procedures in making a considered determination that a fugitive is not more likely than not to be tortured, a court may not inquire into that decision, which often depends

on complex, delicate, and confidential judgments concerning conditions in foreign countries and multiple foreign relations considerations.

As described below in this brief, the State Department has an established and extensive procedure in place to address allegations of torture. Pursuant to State Department regulations and established practice, multiple State Department policy, legal, and embassy offices gather all relevant information so that a torture claim can be fully investigated and assessed. Only when that comprehensive process is complete will the Secretary decide whether to issue an extradition surrender warrant. In appropriate circumstances, such a warrant will be issued only after the United States receives specific assurances of appropriate treatment by the receiving foreign state, subject to ongoing monitoring.

A ruling that these determinations by the Secretary of State are justiciable could significantly undermine the ability of the United States to carry out its treaty obligations to extradite fugitives in a timely manner. This result can cause serious friction in our relations with friendly nations, and impede the ability of the requesting state to prosecute, particularly if

the relevant statute of limitations runs, witnesses disappear, victim recollections fade, and evidence becomes lost or grows stale. This in turn threatens the cooperative relationships necessary for the United States' ability to obtain assistance from foreign states in returning fugitives to this country so that they can be tried in the courts here. Acceptance of Trinidad's argument could thus undermine the United States' ability to obtain the return of fugitives, including terrorists and other criminals whose conduct threatens U.S. national security and the safety and lives of U.S. nationals. Indisputably, a properly functioning extradition process is essential for foreign relations, national security, effective domestic and international law enforcement, and the ability to bring some measure of meaningful and timely justice to victims.

STATEMENT OF JURISDICTION

Trinidad invoked the jurisdiction of the district court pursuant to 28 U.S.C. 2241, and filed a habeas petition seeking to prohibit his extradition by the United States to the Philippines. On November 17, 2009, the district court granted Trinidad's habeas petition, and subsequently ordered his release. Excerpts of Record ("ER") 94. The Government filed

a timely notice of appeal on December 17, 2009. ER 95-96; Fed. R. App. P. 4(a)(1)(B). The order granting the habeas petition is appealable under 28 U.S.C. 2253.

STATEMENT OF THE ISSUE

The appeal presents the following question: Whether the district court erred in holding justiciable a determination by the Secretary of State that Trinidad can be surrendered lawfully for extradition to stand trial in the Philippines because he is not more likely than not to be tortured there.

STATUTES INVOLVED

The pertinent statutory and regulatory provisions are reprinted in an addendum at the end of this brief.

STATEMENT OF THE CASE

This case involves a determination by the United States Government to comply with a treaty-based request from the Republic of the Philippines to extradite Trinidad to stand trial there on a kidnap-for-ransom charge. The Secretary of State made a determination to surrender Trinidad to Philippine law enforcement officials consistent with U.S. treaty

obligations,[2] including the Torture Convention. In doing so, the Secretary rejected Trinidad's claim that his extradition is not authorized by law because it is more likely than not that he will be tortured in the Philippines.

Trinidad filed this second petition for a writ of habeas corpus, asserting that the Secretary's determination violates U.S. law and policy that forbids extradition of fugitives who likely will be tortured in the receiving foreign state. The Government moved to dismiss Trinidad's habeas petition, arguing that, pursuant to the Rule of Non-Inquiry, the surrender decision by the Secretary of State is not justiciable. The district court rejected the Government's argument, and directed the United States to turn over to the courts records that would reveal, for example, dealings with Philippine officials concerning how Trinidad would be treated after

[2] Article 1 of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines is entitled "Obligation to Extradite" and applies to Trinidad's extradition. It provides that the "Contracting Parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with or convicted of an extraditable offense." Extradition Treaty Between the Government of the United States of America and the Government of the Republic of the Philippines, article 1, signed on November 13, 1994, entered into force on November 22, 1996 (1994 UNTS 279).

extradition, and internal deliberative materials regarding the decision to surrender Trinidad. The Government respectfully declined and the district court granted Trinidad's habeas petition and ordered him released. The United States appealed, and this Court granted our motion to expedite the appeal. After a panel of this Court affirmed the district court's judgment, this Court granted the Government's petition for rehearing *en banc*.

STATEMENT OF THE FACTS

There is considerable background to this case – both legal and factual – that is essential to a proper understanding of this appeal. We therefore describe here the statutory scheme that governs extraditions, prior opinions by this Court concerning that scheme, recent statutory developments, recent Supreme Court precedent, and the facts involving the request from the Philippine government for Trinidad's extradition.

A. The Extradition Process

1. Extradition in the United States is a treaty-based means by which a fugitive (either a U.S. citizen or an alien) is transferred to a foreign country to face criminal charges. This process is initiated by a request

from a foreign country to the United States Department of State, which along with the Department of Justice, evaluates whether the request is within the scope of the applicable extradition treaty. If the Departments of State and Justice determine that it is, the appropriate U.S. Attorney files a complaint in district court for an arrest warrant for the charged fugitive. ER 7-8. Following the fugitive's arrest, a several-part process ensures.

In the initial phase, a district judge or magistrate judge (depending on local rule or practice) determines whether the crime at issue is extraditable, and whether there is probable cause to sustain the charge against the fugitive. See 18 U.S.C. 3184; ER 8. As this Court has explained, the judicial officer "'has no discretionary decision to make.'" *Prasoprat v. Benov*, 421 F.3d 1009, 1012 (9th Cir. 2005) (quoting *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997)). Rather, "'if the evidence is sufficient to sustain the charge, the inquiring [judicial officer] is required to certify the individual as extraditable to the Secretary of State and to issue a warrant.'" *Prasoprat*, 421 F.3d at 1012 (quoting

Blaxland v. Commonwealth Dir. of Pub. Prosecutions, 323 F.3d 1198, 1207 (9th Cir. 2003)); 18 U.S.C. § 3184.

The extradition judge's decision whether to certify extraditability is not dependent on consideration of humanitarian claims, such as the age or health of the fugitive. Similarly, consideration of the likely treatment of the fugitive if he were to be transferred to the country requesting extradition is not part of the court's decision to certify extraditability. *Prasoprat*, 421 F.3d at 1014-17; ER 9.

A judicial extradition certification is not appealable, but is subject to limited collateral review through the habeas corpus process. See *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Prasoprat*, 421 F.3d at 1013. The district court's habeas review of an extraditability determination is confined to whether the extradition judge had jurisdiction to conduct the proceeding and had jurisdiction over the fugitive, whether the applicable extradition treaty was in force and covered the crime at issue, and whether there was probable cause that the individual committed the crime. *Prasoprat*, 421 F.3d at 1013.

2. If a judge certifies extraditability and the limited habeas relief available under *Fernandez* is denied in the courts, the Secretary of State determines whether to surrender the fugitive to the custody of the requesting country. See 18 U.S.C. 3186 ("[t]he Secretary of State *may* order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged") (emphasis added); *Prasoprat*, 421 F.3d at 1015 ("discretion belonged to the Secretary of State" as to whether to extradite).

The Supreme Court has emphasized that the surrender of a fugitive to a foreign government is "purely a national act * * * performed through the Secretary of State" and within the Executive's "powers to conduct foreign affairs." *In re Kaine*, 55 U.S. (14 How.) 103, 110 (1852); *Vo v. Benov*, 447 F.3d 1235, 1237 (9th Cir 2006) ("'extradition is a matter of foreign policy entirely within the discretion of the executive branch, except to the extent that the statute interposes a judicial function'") (quoting *Lopez-Smith*, 121 F.3d at 1326); *Blaxland*, 323 F.3d at 1207 ("extradition

is a diplomatic process carried out through the powers of the executive, not the judicial, branch").

Accordingly, the Secretary of State's determination whether to surrender a fugitive who has been certified as extraditable has traditionally been treated by the courts as final and "not subject to judicial review." *Lopez-Smith*, 121 F.3d at 1326. The nonjusticiability of the Secretary's surrender determination in this context stems from a principle known as the Rule of Non-Inquiry.[3]

Under the Rule of Non-Inquiry, judicial review over the myriad factors that the Secretary of State takes into account as she decides for or against extradition surrender is not appropriate. Among other factors are humanitarian issues and matters historically arising under the Rule of Non-Inquiry, including whether the extradition request was politically motivated, and whether the fugitive is likely to be persecuted or denied a fair trial or humane treatment upon his transfer. See ER 10.

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[3] This Court has noted that an exception to the Rule of Non-Inquiry might exist in certain extreme cases that would genuinely shock the conscience See *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326-27 (9th Cir. 1997). However, no such circumstance is posed here.

3. Pursuant to the Torture Convention, the United States has an obligation not to transfer a person if it is more likely than not that he will be tortured in the receiving country. See ER 10. The Department of State has in place regulations (see 22 C.F.R. 95.1 through 95.4) and practices to carry out this obligation.

The applicable State Department procedures to determine whether to surrender a fugitive who claims that he will be tortured by the requesting state reflect multi-layered safeguards involving all three branches of government, and multiple reviews that ultimately culminate in a decision by the Secretary of State.[4]

As a threshold matter, all extraditions are carried out pursuant to a treaty that has been rigorously scrutinized by both the Executive and Legislative Branches because U.S. policy and practice provide for the extradition of U.S. citizens. The Executive Branch does not enter into an extradition relationship unless it is satisfied that the proposed extradition partner has appropriate rule of law and human rights practices in place.

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[4] The State Department procedures were described in part in the district court here through the declaration of Clifton Johnson, the State Department Assistant Legal Adviser for Law Enforcement and Intelligence. ER 7-18.

Such issues are reviewed by the Senate during its provision of Advice and Consent to the proposed extradition treaty. While this process does not preclude the possibility of mistreatment in a country with which we have an extradition relationship, it does preclude the United States from considering and acting upon extradition requests from many of the countries with the most problematic human rights records and which pose the greatest treatment concerns. Once a treaty is in force, it creates an ongoing extradition relationship between the United States and the Requesting State that provides strong incentives for each State to meet its treaty obligations and treat extradited individuals appropriately so as to continue an effective extradition relationship.

When an individual extradition request is received by the United States, it is reviewed by the Departments of State and Justice to ensure that it satisfies treaty requirements. This review process filters out insufficient requests that may be a pretext for seeking access to a fugitive for mistreatment, political, or other improper purposes.

Once a request is deemed by the Executive Branch to have met the requirements of the treaty, it is submitted to a federal court for review.

This is a second safeguard against insufficient requests that may be a pretext for seeking access to a fugitive for improper means.[5] If the court finds that the fugitive is extraditable, it certifies the fugitive's extraditability to the Secretary of State. See 18 U.S.C .3184, 3186. After all relevant legal challenges are concluded, the Department of State initiates a new review of the case and prepares it for a final decision by the Secretary. See 18 USC 3184, 3186.

State Department regulations require the Secretary, in cases where torture concerns are raised, to determine whether a fugitive is more likely than not to face torture if extradited, and they set forth the procedures for making such a determination. 22 C.F.R. 95.1 through 95.4. Pursuant to those procedures, whenever allegations relating to torture are brought to

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[5] As already noted (*supra* at 10), like the Executive Branch, the courts determine, among other points, that an extradition treaty is in force between the U.S. and the requesting state, criminal charges and an arrest warrant have been filed against the fugitive in the requesting state, the offenses for which the fugitive is sought are extraditable offenses under the treaty, evidence satisfying the U.S. standard of "probable cause" exists to support the criminal charges for which the fugitive is sought, there is no defense to extradition under the terms of the treaty (*e.g.*, the offense is not a political offense), and the person before the court is the person sought by the requesting state.

the Department's attention, by the fugitive or otherwise, "appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant." *Id*. at 95.3.

As a matter of practice, the State Department offices involved in such a review include, at a minimum, the Legal Adviser's Office, the Bureau of Democracy, Human Rights, and Labor, the relevant regional bureau, and the U.S. Embassy in the requesting state. In making a recommendation to the Secretary, the State Department consults information available to it, including any information gathered by the relevant Department offices and U.S. Embassy, the State Department Human Rights Country Reports, and all information submitted by or on behalf of the fugitive or his representative. The recommendation made to the Secretary includes a written summary of all of the information collected by the various offices involved in reviewing the claim of torture, copies of any relevant documents (such as relevant Human Rights Country Reports and affidavits or other information submitted by the fugitive), and an analysis of the claim, including a description of any communications about the case

with the requesting state. ER 11-12.

Once an extradition occurs, the receiving state is motivated to ensure fair treatment (and to honor any treatment commitments it has made) in order not to put at risk future extradition requests. Further post-extradition safeguards are provided by regular consular visits in the case of extradited American citizens and, in appropriate cases as determined by the Secretary, arrangements with the requesting state to allow and facilitate regular monitoring of the extradited individuals' condition and treatment. See ER 13-14.

In 2009, the President directed the formation of a "Special Task Force on Interrogation and Transfer Policies * * * to review interrogation and transfer policies." Executive Order No. 13,491, Section 5(a) (74 Fed. Reg. at 4893). As relevant here, the Task Force was instructed "to study and evaluate the practice of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of persons to other nations to face torture." *Ibid.*

The Task Force made several recommendations aimed at clarifying

and strengthening U.S. procedures for obtaining and evaluating assurances of humane treatment. See *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009) <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>. These included a recommendation that the State Department be involved in evaluating assurances in all cases and a recommendation that the Inspectors General of the Departments of State, Defense, and Homeland Security prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances. See *ibid* .

The Task Force also made several recommendations for improving the United States' ability to monitor the treatment of individuals transferred to other countries, including a recommendation that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism,to ensure consistent private access to the individual who has been transferred, with minimal advance notice to the detaining government. See *ibid*. The Government is currently implementing Task Force recommendations.

4. The Johnson Declaration explains that the State Department's

decision-making in extradition cases often raises sensitive issues in this context. To assess torture claims, the Secretary may need to weigh conflicting evidence from various sources regarding the situation in the requesting country, including materials submitted by the fugitive and others on his behalf. See ER 11-12. The Secretary may need to decide whether to broach with foreign officials the question of possible mistreatment, and, if she does so, to determine which foreign officials to approach and in what format to address them. ER 16.

When torture claims are made, the Secretary may also have to determine whether to seek assurances from the requesting country, and concomitantly, to make the particularly delicate evaluation of whether such assurances by officials of a foreign nation are likely to be reliable and credible. ER 12-13. Such assurances may include, for example, that the fugitive will have regular access to counsel and the full protections afforded under the requesting country's laws. Decisions on whether to seek assurances are made by the Secretary on a case-by-case basis. ER 14.

Johnson described how a decision to request an assurance may require expertise in a variety of matters, including an understanding of

the nature and structure of the requesting country's government and its degree of control over the relevant actors within its judicial system. ER 13-14. It also may require an ability to predict how the requesting country is likely to act in light of its past assurances and behavior, and experience to evaluate whether confidential diplomacy or public pronouncements would best protect the safety of the returned fugitive. ER 13-14. The Secretary may consider U.S. diplomatic relations with the requesting state when evaluating assurances, as well as the requesting state's incentives and capacities to fulfill its assurances to the United States, including the importance to the requesting state of maintaining an effective extradition relationship with the United States. ER13.

In appropriate cases, the State Department may monitor or arrange for a qualified third-party, such as a non-governmental human rights group, to monitor the condition of the fugitive after his or her transfer. ER 13-14.

Johnson further explained that the State Department's ability to seek and obtain assurances from a requesting nation depends in part on the Department's ability to treat these dealings with discretion. ER 16.

Judicial intrusion into aspects of these relationships could damage the ability of the United States to conduct foreign relations with such a country. ER 17.

Johnson additionally noted that, if the State Department is required to make public its diplomatic communications with a requesting foreign state about allegations of torture, that state, as well as other states, would likely be reluctant to communicate frankly with the United States concerning such issues. Experience by State Department officials has demonstrated that the delicate diplomatic exchange that is often required in these contexts cannot occur effectively except in a confidential setting. Moreover, later review in a public forum of the State Department's dealings with a requesting country regarding extradition matters would seriously undermine the Department's ability to investigate torture allegations and to reach acceptable accommodations with requesting states. ER 17.

In addition, Johnson pointed out that a judicial decision overturning a surrender determination made by the Secretary of State after extensive discussions and negotiations with a requesting state could seriously

undermine the foreign relations of the United States. ER 17. Johnson also concluded that the delay itself caused by a new round of judicial review and appeal could undermine the requesting country's ability to prosecute a fugitive, and also harm efforts by the United States to press other countries to act more expeditiously in surrendering fugitives for trial in the United States. ER 17-18.

5. As we discuss in depth later in this brief, Congress has provided in the REAL ID Act for judicial consideration of Torture Convention claims in the context of review of certain types of removal orders in the immigration context, while barring it in other contexts, which would include extradition. See 8 U.S.C. 1252(a)(4).

This legislative judgment shows that in the immigration removal situation – which does not involve legally binding bilateral treaty obligations entered into and implemented by the Executive Branch, and reciprocity concerns that exist in the extradition process – Congress made a policy choice to allow courts to engage in limited judicial review. In the extradition realm, however, as already noted, the United States has a vital interest both in timely meeting its extradition obligations to its treaty

partners and in prosecuting individuals who have committed crimes punishable under United States law, but who have escaped to foreign soil.

Additionally, the extradition process involves fundamental differences from the immigration context that significantly reduce the risk of possible torture. While immigration removal is available with respect to any country, fugitives may only be extradited to countries with which the United States has established a bilateral extradition relationship through a treaty. In determining whether to establish such a treaty relationship, the United States considers the human rights record of the country and assesses whether the security and rights of the extradited individual would be adequately safeguarded. These assessments are in turn considered by the Senate during the process of providing advice and consent to any proposed extradition treaty. See, *e.g.*, *Extradition Treaties*, Hearing before the Senate Committee on Foreign Relations, 104th Cong., 2d Sess., 11 (1996) (colloquy between the Committee Chairman and State Department witnesses).

Additionally, extradition transfers also occur in the context of a bilateral treaty relationship that provides an ongoing basis for assessing

how a country treats extradited fugitives and provides significant incentives for countries to ensure appropriate treatment so as not to jeopardize future transfers. Further, the fact that individuals are extradited to face trial and only after a decision by a U.S. federal court confirming that there is probable cause to suspect the individual of having committed the crime also helps ensure that an individual is being sought for legitimate law enforcement reasons rather than politically motivated reasons or abuse.

B. The *Cornejo* Litigation

This Court's earlier consideration of the Government's attempt to extradite Ramiro Cornejo-Barreto to Mexico provides further background for the current litigation, although the opinion in that case obviously is not binding on this en banc panel.

The *Cornejo* case involved a request by the Mexican government for Cornejo's extradition from the United States on murder charges. After the district court certified extraditability, Cornejo filed a habeas action, arguing that he could not be extradited lawfully to Mexico because he would be tortured there.

The district court denied Cornejo's habeas petition, and a panel of this Court affirmed denial of Cornejo's habeas petition because it concluded that his torture claims were not ripe for judicial review because the Secretary of State had not yet made her own determination whether to surrender Cornejo for extradition. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). (In this brief, we refer to this decision as "*Cornejo I*".) Two judges on the panel, however, went on to state that, if the Secretary later decided to move forward with extradition, Cornejo could, under the Administrative Procedure Act, file a successive habeas action in federal district court to challenge the validity of the Secretary's decision measured against U.S. law and policy providing that a fugitive will not be extradited if it is more likely than not that he will be tortured in the receiving country. *Cornejo I*, 218 F.3d at 1016.

Judge Kozinski concurred in the *Cornejo I* dismissal, but did not join the majority's discussion of hypothetical later jurisdiction. Judge Kozinski would have held instead "that the district court does not have jurisdiction to review petitioner's claim under the Torture Convention because [the domestic statute implementing that treaty] does not authorize judicial

enforcement of the Convention." *Id*. at 1017.

The Secretary of State subsequently decided to surrender Cornejo to Mexican authorities, and Cornejo therefore filed a successive habeas action. The district court dismissed this second petition, and Cornejo appealed. In the second appeal, the Government asserted that the prior panel majority's statement about a subsequent action under the Administrative Procedure Act had been dictum, given that the panel had determined that there was no jurisdiction at that point over Cornejo's habeas petition. The Government argued that this Court should not be bound by the *Cornejo I* dictum, and should instead apply the Rule of Non-Inquiry to dismiss Cornejo's succeeding petition as non-justiciable. The second *Cornejo* panel agreed with the Government's position, ruling that the Secretary of State's final decision to surrender a fugitive is not justiciable. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075 (9th Cir. 2004) (referred to in this brief as "*Cornejo II*").

This Court ordered *en banc* review, and therefore vacated the *Cornejo II* panel decision. *Cornejo-Barreto v. Siefert*, 386 F.3d 938 (9th Cir. 2004) (Schroeder, CJ.). Before the *Cornejo* case could be decided *en banc*,

however, Mexican prosecutors notified the State Department that, given how long the extradition proceedings in the United States had taken, the statute of limitations in Mexico had run, precluding Cornejo's prosecution there. Accordingly, Mexico's extradition request was withdrawn. The U.S. Government notified this Court, which dismissed the matter as moot. See *Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004).[6]

C. The Government's Attempt to Extradite Trinidad

In September 2007, a United States magistrate judge certified to the Secretary of State that Trinidad is extraditable pursuant to the request by the Philippines for his extradition to face a charge that he had participated in a kidnap-for-ransom scheme in the Philippines. Trinidad challenged that certification through a petition for writ of habeas corpus pursuant to 28 U.S.C. 2241, claiming that his extradition would be unlawful because he would be tortured if returned to the Philippines, and because there was

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[6] Several panels in this Court have cited *Cornejo I* in passing, but their reference to that decision was in the form of an acknowledgment or background discussion. See*, e.g.*, *Prasoprat*, 421 F.3d at 1016 n.5 (noting that, pursuant to *Cornejo I*, the Rule of Non-Inquiry does not prevent a fugitive who fears torture upon surrender to the requesting state from petitioning for habeas corpus review of the Secretary of State's decision to extradite him); *Blaxland*, 323 F.3d at 1208.

no probable cause to believe that he had been involved in the kidnaping. The district court denied Trinidad's petition without prejudice to the filing of a new petition should the Secretary of State decide to surrender him. ER 23-24.

In September 2008, after considering Trinidad's torture allegations, the Secretary of State directed Trinidad's surrender to Philippine authorities. Trinidad then filed the current action through a second habeas petition in district court, challenging the Secretary's extradition surrender determination on the grounds that, according to Trinidad: (1) the Secretary's decision was arbitrary and capricious in violation of the Administrative Procedure Act because there are "substantial grounds" to believe Trinidad will be tortured upon his surrender; (2) his due process rights were violated because he was not given notice and a hearing prior to the Secretary's surrender determination; and (3) there is a "substantial likelihood" that he will be tortured upon his return to the Philippines, making the surrender determination a violation of Trinidad's substantive due process rights. ER 2-3. The district court stayed Trinidad's extradition pending resolution of his second habeas petition.

D. The Torture Convention and its Implementation through the Foreign Affairs Reform and Restructuring Act of 1988

1. In his second habeas petition, Trinidad relies heavily on the Torture Convention, which was adopted by the United Nations General Assembly in 1984. The treaty entered into force for the United States in 1994. U.S. Dep't of State, *Treaties in Force*, 458 (2009); 22 C.F.R. 95.1(a).

Article 3 of the Torture Convention provides:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

S. Treaty Doc. No. 100-20, at 20 (1988).[7]

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[7] In ratifying the Torture Convention, the United States entered an understanding that the United States understands the language "substantial grounds for believing that he would be in danger of being subjected to torture" to prohibit transfers "if it is more likely than not that he would be tortured." See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture And Other Cruel, Inhuman, or Degrading Treatment or Punishment, 136 Cong. Rec. 36,198 (October 27, 1990).

Significantly, the Senate conditioned its approval of the Torture Convention upon a Resolution of Advice and Consent to Ratification declaring that "Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01, at S17492 (Oct. 27, 1990); see also S. Exec. Rep. No. 101-30, at 31 (1990). The Senate therefore understood that the Torture Convention would not create any right to judicial review of determinations made by the "competent authorities" under Article 3. The Senate Foreign Relations Committee stated that position in its report on the Torture Convention:

> The reference in Article 3 to "competent authorities" appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return.* * * Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.

S. Exec. Rep. No. 101-30, at 17-18.

In order to carry out the Torture Convention, Congress enacted the Foreign Affairs Reform and Restructuring Act of 1988 (the "FARR Act"). See Pub. L. 105-277, § 2242, 112 Stat. 2681, 2681-761, 2681-822 (codified

at 8 U.S.C. § 1231 note). This statute directed the heads of appropriate agencies to "prescribe regulations to implement the obligations of the United States under Article 3" of the Torture Convention, subject to the understandings and other similar statements included in the Senate's resolution of advice and consent to atification. Pub. L. No. 105-277 at Section 2242(b).

Of key importance to this case, the FARR Act bars judicial review of the State Department regulations adopted to implement the Torture Convention, and expressly states that the FARR Act does ***not*** create jurisdiction for a court to review claims under the Torture Convention or the FARR Act, except as part of a final order of removal in immigration proceedings:

> Notwithstanding any other provision of law * * * no court shall have jurisdiction to review the regulations adopted to implement this section, and ***nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section***, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal [in immigration cases under the Immigration and Nationality Act].

FARR Act, Section 2242(d) (emphasis added).

E. The REAL ID Act

In 2005, Congress enacted 8 U.S.C. 1252(a)(4) as part of the REAL ID Act. This statute mandates that the "sole and exclusive means for judicial review" of any claim under the Torture Convention is through a petition for review of a removal order filed in a court of appeals in an immigration proceeding. Section 1252(a)(4) states as follows:

> (4) Claims under the United Nations Convention
>
> ***Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28***, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the ***sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment***, except as provided in subsection (e) of this section.

8 U.S.C. 1252(a)(4) (emphasis added).

Thus, the REAL ID Act provides that, notwithstanding any other provision of statutory or nonstatutory law, including specifically the habeas laws, review of immigration removal orders in the court of appeals

is the ***sole*** instance in which judicial review is available to review a claim under the Torture Convention.

F. The Litigation of Trinidad's Second Habeas Petition

1. Trinidad's second habeas petition was assigned to a magistrate judge. The Government argued that Trinidad's Torture Convention-based attack on the Secretary's extradition surrender decision is not justiciable in light of the various laws set forth above.

In addition, the Government relied on the Supreme Court's then-recent decision in *Munaf v. Geren*, 553 U.S. 674 (2008), to contend that Trinidad's claim should be dismissed. The *Munaf* Court denied habeas petitions based on torture claims by two U.S. citizens whom the U.S. Government planned to transfer to the Iraqi government in order to stand trial in Iraqi courts. The Supreme Court there instructed that federal courts should not second-guess Executive Branch decisions to surrender detainees to foreign states where U.S. officials had attested to the U.S. policy of not transferring detainees if they would be more likely than not to face torture, because such judicial review would usurp the proper role of the political branches: "[t]he Judiciary is not suited to second-guess * *

* determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 553 U.S. at 702.

The Supreme Court stressed that, "[i]n contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." *Ibid.*; *accord id.* at 700-01 ("Even with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments").

2. The magistrate judge here recommended that the district court reject the Government's non-justiciability argument. ER 19-67. The thrust of the magistrate judge's recommendation was that *Cornejo I* was binding law in this Circuit, and mandated that a fugitive can pursue a habeas action under the Administrative Procedure Act in order to gain judicial review of a claim that the Secretary of State's extradition determination violates the Torture Convention. The magistrate judge read

the Supreme Court's *Munaf* decision not to overrule *Cornejo I* because *Munaf* was not an extradition case, and because the Supreme Court was not dealing with a claim under the FARR Act. ER 53-58.

In addition, the magistrate judge recommended to the district court that it hold that the REAL ID Act is not applicable to Trinidad's Administrative Procedure Act claim because the former statute deals with immigration issues and does not cover extradition matters. ER 58-64. Thus, the magistrate judge's report concluded that the REAL ID Act did not override the asserted binding nature of *Cornejo I* within this Circuit. ER 64.

The magistrate judge therefore recommended that the Government's motion to dismiss be denied, and that the district court conclude that the State Department had failed to present evidence to establish the basis for the Secretary's determination to surrender Trinidad; rather, the State Department had merely presented material describing the procedures followed by the agency to decide whether to surrender a fugitive in the face of Torture Convention claims. ER 65-67. The magistrate judge proposed that the district court order the Secretary of State "to produce evidence

from the administrative record underlying the Secretary's decision to surrender [Trinidad] to the Philippines, sufficient to enable this court to determine whether the Secretary acted arbitrarily, capriciously, an abuse of discretion, or in violation of the law, in light of her duties under the Torture Convention, the FARR Act, and State Department regulations." ER 66-67.

3. The district court adopted the magistrate judge's recommendation, and ordered the Secretary to submit this diplomatic an administrative record, including sensitive diplomatic material to the court. ER 68-69. The district court indicated that the Secretary "may at that time raise any issues about the appropriate protection of confidential materials." ER 69.

The Government requested that the district court certify its justiciability ruling for immediate interlocutory appeal to this Court, but the district court declined to do so. ER 70-76.

4. Following denial of its interlocutory appeal request, the Government notified the district court that it would not produce State Department records that disclose dealings between the State Department

and Philippine officials concerning Trinidad's torture allegations. ER 77-78. The district court therefore on November 17, 2009, reiterated its prior rationale for finding jurisdiction, and granted Trinidad's habeas petition. ER 80-94. Trinidad was shortly thereafter released on bail.

STANDARD OF REVIEW

This appeal turns entirely on a question of law – whether the Secretary's surrender determination is justiciable – and is thus reviewed by this Court *de novo*. *United States v. Semler*, 883 F.3d 832, 833 (9th Cir. 1989).

SUMMARY OF ARGUMENT

In the first part of our argument below, we establish that, through the clear text of the REAL ID Act, Congress unambiguously provided that the sole instance in which judicial review of a claim under the Torture Convention is available is in connection with certain immigration proceedings in the courts of appeals. This plain language can neither be disregarded nor rewritten, and it governs this case. The district court here erred in refusing to dismiss Trinidad's petition under the force of that clear statutory provision, and this Court need go no further in its analysis.

We further demonstrate that the restriction on judicial review in the REAL ID Act fits well within the constitutionally-based principle behind the Rule of Non-Inquiry, which was recently given strong support by the Supreme Court in *Munaf v. Geren*, 553 U.S. 674. There, the Supreme Court held that the Judiciary could not interfere with the Executive's decision to surrender to the Government of Iraq two detained American citizens so that they could stand trial in Iraqi criminal courts. The Court ruled that judicial review of surrender determinations made by the Executive after consideration of torture allegations, would improperly constitute judicial usurpation of the appropriate role of the political branches.

Munaf strongly reinforces the principles underlying decades of precedent, in this and other Circuits, upholding the Rule of Non-Inquiry. Under this venerable doctrine, extradition surrender decisions by the Secretary of State are deemed non-justiciable because they inherently involve sensitive foreign relations matters and assessments about conditions in, and relations with, foreign countries that are the exclusive province of the Executive Branch. In other words, it is for the Secretary

of State – and not the courts – to weigh the myriad relevant factors and binding U.S. law and policy, and determine whether to surrender a fugitive for extradition when presented with an allegation by a fugitive that his extradition should not be authorized because he will be mistreated in the requesting foreign state.

There should be no doubt that, in light of the Torture Convention and its implementation through the FARR Act and State Department regulations, the Secretary of State will not surrender a fugitive for extradition if torture is more likely than not to occur in the receiving state. We are thus ***not*** arguing that the Secretary has the discretion to surrender a fugitive who likely will be tortured, even if particular foreign policy interests at the time might be served.

This case is therefore not about whether the United States may surrender someone for extradition when it believes he is more likely than not to be tortured; it may not do so. Rather, this case is about whether, where appropriate policies and procedures are in place and the Secretary has followed them in determining that a particularly fugitive is not likely to be tortured, courts may not inquire into that decision – a decision that

often depends on complex, delicate, and confidential judgments concerning the state of affairs in foreign countries and multiple foreign relations considerations.

For these very reasons, this Court has held in the past that the Rule of Non-Inquiry governs even when humanitarian claims are raised in attempts to stop extraditions. These precedents have not been overruled by Congress through the FARR Act or the REAL ID Act. To the contrary, Congress' enactments since the United States ratified the Torture Convention have reaffirmed that the Rule of Non-Inquiry governs attempts to attack in the courts the Secretary's extradition surrender determinations.

A contrary ruling that allowed judicial review of extradition surrender determinations made by the Secretary of State would impose a substantial cost. There is a significant public interest in ensuring that the United States abides by its own extradition treaty obligations so that these treaties can be effectively implemented. Thus, in denying a stay of extradition in another case, this Court explained that "the public interest will be served by the United States complying with a valid extradition

application * * * under the treaty," because such compliance "promotes relations between the two countries, and enhances efforts to establish an international rule of law and order." *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

A timely extradition process is a necessary aspect of a functioning extradition relationship between two nations. Excessive delay can jeopardize a foreign prosecution and undercut the core objective of extradition relationships to ensure that fugitives are brought to justice in the country in which their criminal conduct occurred. The United States can reasonably expect foreign governments to honor their extradition obligations to the United States only if it also honors its own such obligations.

Trinidad is accused of a serious, but straightforward, kidnaping offense in a Philippine court, yet the extradition process here has been pending for more than four years. It is therefore important that his extradition be carried out promptly, and all the more so given that the Secretary has concluded that Trinidad can be extradited consistent with the Torture Convention and U.S. law. If a relatively uncomplicated

extradition request like this one becomes bogged down in U.S. courts for such a lengthy period, it will become apparent to our treaty partners that more complex requests may be futile or become so entangled in the courts that they become moot before the extradition can be carried out.

Such mootness has occurred twice recently with regard to extraditions that were severely delayed by litigation involving Torture Convention claims. This is what happened in *Cornejo* where an extradition to face murder charges in Mexico was mooted because the U.S. extradition proceedings took so long that the prosecution of the underlying criminal charges became time-barred in Mexico. See *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004). And in *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008), the U.S. extradition proceedings took so long that the entire possible Romanian sentence for the fugitive had expired before judicial review was completed and the case became moot, so that the Supreme Court granted the parties' request to dismiss the petition for certiorari.

Most recently, in another extradition proceeding in this Circuit, the Government was able to complete an extradition to Thailand, despite the

existence of Torture Convention claim, only because the district court ruled that the fugitive had not made a sufficient showing of likely torture, and this Court denied a request to enjoin the surrender pending appeal. See *Prasoprat v. Benov*, No. 09-56067 (9th Cir. March 10, 2010) (order denying stay of extradition). Even in that circumstance, the extradition took approximately nine years to effectuate.

These problems in the extradition process will be compounded if a fugitive can extend an already protracted and multi-layered extradition process by triggering a new round of judicial review following any decision by the Secretary involving torture risk allegations. Foreign governments will increasingly conclude that the U.S. court system renders the United States essentially incapable of complying in a timely and meaningful way with its extradition treaty obligations. The interest and ability of the United States to obtain reciprocal cooperation by its treaty partners would thereby be seriously and irreparably damaged by such a ruling.

ARGUMENT

Under The REAL ID Act And The Rule Of Non-Inquiry, Trinidad's Challenge To The Determination By The Secretary Of State To Surrender Him For Extradition To The Philippines Is Not Justiciable.

A. The REAL ID Act Precludes Judicial Review of Torture Convention Claims in the Habeas Context.

1. The REAL ID Act (8 U.S.C. § 1252(a)(4)) requires dismissal of Trinidad's habeas petition attacking the Secretary's extradition surrender determination. Section 1252(a)(4) unambiguously provides that "the *sole* and *exclusive* means for judicial review of *any* cause or claim under the [Torture Convention]" is the filing in a court of appeals of a petition for review challenging a final order of removal under the immigration laws (emphasis added).[8] See 8 U.S.C. 1252(a)(1) (providing review of a "final order of removal").

Congress could not have used more explicit terms to provide that a claim under the Torture Convention is susceptible of judicial review only

[8] The REAL ID Act contains a single a statutory exception, which covers certain limited expedited removal challenges under "subsection (e)" of 8 U.S.C. 1252 (pertaining to aliens seeking to immigrate), which only confirms the otherwise limited availability of judicial review.

in a single circumstance. Because the sole circumstance where review of a Torture Convention claim is available is in the context of a final order of immigration removal, the language of the REAL ID Act necessarily precludes Administrative Procedure Act review of a Torture Convention claim under habeas law in connection with an extradition surrender decision. And, there can be no question that Trinidad's claim here arises under the Torture Convention. See ER 23, 25, 81.

The REAL ID Act limitation on jurisdiction over Torture Convention claims exists "notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." 8 U.S.C. 1254(a)(4). By using this language, Congress intended to supersede any potentially conflicting law. See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section").

Congress also explicitly provided that the REAL ID Act superseded statutory *and nonstatutory* law, and it therefore preempts contrary judicial

decisions – including *Cornejo I* and any other decision allowing for habeas jurisdiction over Torture Convention claims outside the specified context of a final order of removal.

The D.C. Circuit recently applied the language of Section 1252(a)(4) of the REAL ID Act to hold that Guantanamo Bay detainees cannot succeed in habeas actions raising claims under the Torture Convention. In *Kiyemba v. Obama*, 561 F.3d 509,514-15 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010), the D.C. Circuit ruled that Guantanamo detainee habeas petitioners could not rely on claims under the Torture Convention in order to force notice by the Government before they were transferred out of Guantanamo to third countries, where the United States had a firm policy not to transfer individuals to a place where they were more likely than not to be tortured.

The detainee petitioners in *Kiyemba* asserted that they might be tortured upon transfer to other countries, and that the courts could review their habeas claims despite the Supreme Court's holding in *Munaf*, 553 U.S. at 702, that the judiciary is not properly suited to second-guess Executive Branch determinations about the likelihood of torture in

receiving states. The *Kiyemba* detainees argued that *Munaf* did not apply to their case because they were raising claims under the Torture Convention, as implemented by the FARR Act.

The D.C. Circuit rejected this argument because the REAL ID Act statutory language of Section 1252(a)(4) established that Torture Convention claims could be considered by courts only in the immigration removal context. *Kiyemba*, 561 F.3d at 514-15. The court further noted that the record in that case, as here, documents the policy of the United States not to transfer a detainee to a country where he is likely to be tortured." *Id*. at 514.

2. The district court here, relying on the magistrate judge's recommendation, nevertheless found the plain text of the REAL ID Act inapplicable because the court detected no indication that the statute was meant to govern in the extradition context. The district court cited language in the statute and its legislative history to show that Congress' focus when passing this statute was on immigration order review issues. ER 60-63. But the district court's lengthy discussion of the legislative background of the REAL ID Act merely reveals that Congress was spurred

to act specifically by concerns about avenues of judicial relief over Torture Convention claims in the immigration context, and that through Section 1252(a)(4) it was making some types of Torture Convention claims enforceable in U.S. courts in certain immigration proceedings.

The district court did not cite any evidence that the unequivocal statutory text narrowly allowing judicial review of Torture Convention claims only in the context of a final order of removal was, contrary to its plain terms, meant to allow enforcement of Torture Convention-based claims in other types of habeas proceedings, such as in the extradition context. The district court therefore had no justification for disregarding the plain statutory text.

3. The text of the REAL ID Act squares with the fact that Article 3 of the Torture Convention is not self-executing, and therefore, in the absence of implementing legislation, creates no judicially enforceable rights in the context of extradition. The U.S. Senate expressly conditioned its advice and consent to ratification of the Torture Convention on a declaration that Articles 1 through 16 of the Convention are "not self-executing," 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); see also

S. Exec. Rep. No. 101-30, at 31 (1990).[9] Indeed, the Executive Branch explained in a statement that was included in the Senate's report on the Torture Convention that because these treaty provisions are not self-executing, extradition determinations by the Executive Branch "will not be subject to judicial review in domestic courts." S. Exec. Rep. No. 101-30, at 17-18.

The Supreme Court has made clear that a non-self-executing treaty such as the Torture Convention does not confer judicially enforceable rights upon a private party. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (a non self-executing treaty does not create obligations directly enforceable by private parties in the federal courts, even when, by its

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[9] The Second, Third, Fourth, Sixth, Eighth, and Eleventh Circuits have all held that these articles of the Torture Convention are not self-executing. See *Cherichel v. Holder*, 591 F.3d 1002, 1006 (8th Cir.), *cert. denied*, 131 S.Ct. 74 (2010); *Zheng v. Holder*, 562 F.3d 647, 655 (4th Cir. 2009); *Pierre v. Attorney General of United States*, 528 F.3d 180, 185 (3d Cir. 2008) (en banc); *Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007); *Renkel v. United States*, 456 F.3d 640, 644 (6th Cir. 2006); *Reyes-Sanchez v. United States Attorney General*, 369 F.3d 1239, 1240 n.1 (11th Cir. 2004).

Moreover, Judge Kozinski declined to join the panel majority's dictum in *Cornejo I*, because he concluded that the CAT is not self-executing. See *Cornejo I*, 218 F.3d at 1017 (Kozinski, J., concurring).

terms, that treaty protects individual civil rights); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect").

Despite this authority, in prior briefing in this Court, Trinidad has contended that the Supreme Court's ruling in *Medellin v. Texas*, 552 U.S. 491 (2008), compels the conclusion that Article 3 of the Torture Convention is self-executing, and thus directly enforceable in individual court actions through vehicles such as the Administrative Procedure Act and habeas corpus. But Trinidad gains no support from *Medellin*; that decision underscored the importance of the intent of the Senate and the President as to whether a treaty would be self-executing. See *Medellin*, 552 U.S. at 519 (noting that "we have held treaties to be self-executing when the textual provisions dictate that the President and the Senate intended for the agreement to have domestic effect"). The *Medellin* Court also cited with approval the court of appeals decisions that have found the Torture Convention not to be self-executing. *Id.* at 522 n.12.

Thus, the Torture Convention does not itself make justiciable

extradition surrender determinations of the Secretary of State. The decision by Congress expressed through the text of the REAL ID Act to provide judicial review of claims by individuals under the Torture Convention only in limited contexts of certain final orders of removal is accordingly fully consonant with the restricted domestic scope envisioned by the Senate when it approved the treaty. Moreover, Congress' action in the REAL ID Act flows naturally from the prior enactment of Section 2242(d) of the FARR Act, when Congress provided that nothing in that statute was to be construed as providing any court with jurisdiction to review claims raised under the Torture Convention, except as part of a petition for review of an immigration removal order. See 8 U.S.C. 1231 note.

4. The language of the REAL ID Act refutes the rationale of the panel majority in *Cornejo I*, which stated hypothetically that there would be review of extradition surrender decisions by the Secretary of State concerning Torture Convention claims. That view was based on the notion that the Torture Convention and the FARR Act set a standard by which the courts could judge extradition determinations by the Secretary of State

in a habeas action, utilizing the review mechanism of the Administrative Procedure Act. See *Cornejo I*, 218 F.3d at 1013-17. But Section 1252(a)(4) of the REAL ID Act makes clear that there is no jurisdiction over Torture Convention-based claims under the habeas statute or any other, except in specified instances of final orders of removal.

Trinidad has previously asserted that the habeas statute nevertheless provides a mechanism for judicial enforcement of non-self-executing treaty provisions. This Court's sister Circuits have rejected the proposition that non-self executing treaty provisions can be enforced in the courts through habeas relief. See *Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wesson v. U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059, 1063 (8th Cir. 2002). That consensus is correct because non-self-executing treaty provisions can be enforced through the courts only if Congress has taken explicit action to make them enforceable through judicial actions by private parties.

In addition, Trinidad has argued previously that this Court and other

Circuits have held that the REAL ID Act pertains only to immigration removal cases, and thus cannot be read to cover claims in extradition cases based on the Torture Convention. This contention is mistaken because none of the cases on which Trinidad has relied involved the section of that statute actually at issue here: 8 U.S.C. 1252(a)(4).

In particular, Trinidad most heavily relies on *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), which dealt with a different part of the REAL ID Act than governs here. In *Nadarajah*, this Court ruled that release in the United States should be ordered for an alien who had been tortured abroad, fled to the United States, was detained here, and sought asylum against immigration removal. The Court pointed out that, although neither party had raised any jurisdictional issue, it had a *sua sponte* obligation to examine the point. The Court then held (443 F.3d at 1075-76) that the relevant habeas-stripping provision in the REAL ID Act (8 U.S.C. 1252(b)(9)) applied only to a habeas petition involving a final order of immigration removal, which was not at stake in the case before it. Accordingly, the Court concluded, habeas jurisdiction in immigration cases in other contexts remained available (443 F.3d at 1076).

Our non-justiciability argument in the case at bar is based instead on 8 U.S.C. 1252(a)(4), which is entitled "Claims under the United Nations Convention." As discussed already, the text of that provision states that, notwithstanding any other provision of law, including the habeas statute, the "sole and exclusive means for judicial review of any cause or claim under the [Torture Convention]" is through an action in a court of appeals seeking review of a final order of immigration removal. Thus, by its terms, 8 U.S.C. 1252(a)(4) precludes judicial review with respect to all claims under the Torture Convention regardless of whether they involve immigration removal, and then allows for such review in the limited case of final orders of immigration removal.

By contrast, the *Nadarajah* panel considered only 8 U.S.C. 1252(b)(9). This provision is entitled "Consolidation of questions for judicial review," and by its terms precludes judicial review of questions of law and fact with respect to a more limited universe of cases, that is, "any action taken or proceeding brought to remove an alien from the United States," and then allows such review only with respect to final orders of immigration removal.

In other words, the case now before this Court concerns an extradition surrender decision by the Secretary of State, not a claim for asylum against immigration removal. This Court's *sua sponte* analysis of the breadth of the REAL ID Act in *Nadarajah* thus involved a distinct part of that statute, covering review of immigration removal orders, and did not address the different language of Section 1252(a)(4), which limits review of all Torture Convention claims, notwithstanding any other law.

5. Trinidad has also previously argued that Section 1252(a)(4) of the REAL ID Act should not be read to 'eliminate' habeas jurisdiction to review extradition surrender decisions because Congress did not make such an intent sufficiently clear, and because Congress did not provide an adequate substitute for habeas relief. There are several problems with these arguments.

First, Congress did not eliminate existing habeas jurisdiction in the REAL ID Act – no habeas review of extradition surrender decisions was available in the first place. As we discussed at length above (at 13), this Court and its sister Circuits have for years applied the Rule of Non-Inquiry, under which the courts will not review extradition surrender

decisions by the Secretary of State. See, *e.g.*, *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.3d 103 (1st Cir. 1997). Thus, long before the REAL ID Act, this Court had determined, based on constitutional principles, that there was no habeas right to have a court overturn the Secretary's extradition surrender determinations.

Second, the *Cornejo I* panel majority opined only that the Torture Convention and the FARR Act had for the first time provided a legal standard by which a court could review an extradition surrender decision under the Administrative Procedure Act. The *Cornejo I* panel majority did not create a habeas right that had not existed before; the courts do not create statutory habeas rights. And, Congress in the FARR Act also did not create any habeas rights for extradition fugitives – to the contrary, the plain language of Section 2242(d) of that statute states unequivocally that the FARR Act was ***not*** providing any jurisdiction for a Torture Convention claim to be heard in court except in the immigration removal context. See 8 U.S.C. § 1231 note. Similarly, as shown earlier (at 49-50), the relevant articles of the Torture Convention are not self-executing, and thus did not create any habeas rights enforceable in U.S. courts. See *Cornejo I*, 218

F.3d at 1017 (Kozinski, J., concurring).

Thus, as the many decisions applying the Rule of Non-Inquiry established, no habeas right to obtain judicial review of an extradition surrender decision by the Secretary of State existed, and no such right was created by the Torture Convention or the FARR Act. Accordingly, nothing in the REAL ID Act could be said to have taken away an existing habeas right, given that no such right existed in the first place.

This Court need go no further in its analysis – the REAL ID Act requires dismissal of Trinidad's petition.

B. The Principles Applied by the Supreme Court in *Munaf* Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary of State's Determination to Surrender Trinidad for Extradition.

Even aside from the limiting language of the REAL ID Act, the principles recently enunciated by the Supreme Court in *Munaf* reinforce the longstanding Rule of Non-Inquiry, which precludes judicial review of the Secretary of State's extradition surrender decisions.

This Court has recognized that once a judicial officer has properly determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, the process moves into the foreign affairs arena,

and authority over surrender rests entirely with the Executive Branch. *Prasoprat*, 421 F.3d at 1016-17. At that stage, the Secretary of State exercises her responsibility to determine whether, and under what circumstances, a fugitive should be surrendered for extradition to the requesting country. *Prasoprat*, 421 F.3d at 1012; *Lopez-Smith*, 121 F.3d at 1326. The statutory commitment of this decision to the Secretary reflects a recognition that her determination necessarily involves the application of particular expertise that is not available in the Judiciary, and sensitive foreign relations considerations that are not amenable to judicial review.

In *Munaf* the Supreme Court held that, because the case involved U.S. citizen detainees, the courts had habeas jurisdiction to review a decision by the Executive to surrender two U.S. citizens to Iraqi authorities in order to face criminal charges in Iraqi courts. The Supreme Court nevertheless determined that equitable habeas principles governed and made judicial interference with the Executive's planned action legally inappropriate in light of the United States' firm policy against transferring any person to torture. The petitioners countered that these normal

principles were trumped because their transfer to Iraqi custody was likely to result in torture. See 553 U.S. at 700.

Although allegations of likely torture were "of course a matter of serious concern" to the Supreme Court, the Court unequivocally ruled that this "concern is to be addressed by the political branches, not the judiciary," citing the basic principle behind the Rule of Non-Inquiry (*ibid*). The *Munaf* Court recognized that the Executive may "decline to surrender a detainee for many reasons, including humanitarian ones" (553 U.S. at 702). Significantly, the *Munaf* Court noted the Executive's policy not to transfer a detainee where torture is likely to follow and, like the instant case, *Munaf* did not involve a situation in which the Executive had determined that torture would be likely. *Ibid*.

Under these circumstances, the Supreme Court instructed that, while "the Judiciary is not suited to second-guess such determinations, * * * the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." 553 U.S. at 702. The Court recognized that the political branches possess significant diplomatic

tools and leverage the judiciary lacks." *Ibid.*

In *Munaf*, the Supreme Court noted that the detainees had not properly presented claims for relief under the FARR Act, and the Court expressed no view on whether they should be permitted to amend their pleadings to add such a claim. 553 U.S. at 703 n.6. The Court did raise questions about whether such a claim would succeed, mentioning that the FARR Act "may be limited to certain immigration proceedings." *Ibid.*

The governing principles that the Supreme Court enunciated and applied in *Munaf* cannot be cast aside, as the district court did here; the Supreme Court's reasoning is diametrically at odds with the reasoning by the district court and the panel majority in *Cornejo I*. The *Munaf* Court's rationale is clear and powerful, and provides direction for this Court; it eliminates the foundation for the panel majority's statements in *Cornejo I* concerning possible later review of extradition surrender determinations made by the Secretary.

Munaf establishes that the principles animating the Rule of Non-Inquiry govern fully in a case like this one in which Trinidad asks the courts to review an extradition surrender determination by the Secretary

of State that rejected allegations of likely torture in a receiving state. See also *Hoxha v. Levi*, 465 F.3d 554, 563 (3d Cir. 2006) ("The non-inquiry principle serves interests of international comity by relegating to political actors the sensitive foreign policy judgments that are often involved in the question of whether to refuse an extradition request."); *Blaxland*, 323 F.3d at 1208 ("Unwarranted expansion of judicial oversight may interfere with foreign policy and threaten the ethos of the extradition system."); *Kin-Hong*, 110 F.3d at 110 (the bifurcated extradition procedure reflects the fact that "extradition proceedings * * * implicate questions of foreign policy, which are better answered by the executive branch").

Just as in *Munaf*, judicial review of the Secretary's extradition surrender determinations would place this Court in an obviously inappropriate position. For example, suppose the Secretary had determined in a particular case that, despite a history of human rights abuses in that country, a fugitive would not be tortured. On that basis, and with appropriate provision for monitoring, she then concludes, consistent with the FARR Act and the Torture Convention, that it is *not* more likely than not that the fugitive would be tortured. A court could

evaluate that decision only by second-guessing the expert opinion of the Department of State. See ER 13. It is difficult to contemplate how judges would reliably make such a prediction, lacking any ability to communicate with the foreign government or to weigh the situation there, including the bilateral relationship with the United States, with resources and expertise comparable to those of the Department of State. See *Munaf*, 553 U.S. at 70-03.

Only the Secretary of State has the diplomatic tools at her disposal to best protect a fugitive or ensure humane treatment upon his extradition. See ER 12-14; *Munaf*, 553 U.S. at 702-03; *Kin-Hong*, 110 F.3d at 110. The Secretary may decide to attach conditions to the surrender of the fugitive, such as a demand that the requesting country provide assurances regarding the individual's treatment. See ER 12-13; *Munaf*, 1553 U.S. at 702 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); *Jimenez v. United States District Court*, 84 S. Ct. 14, 19 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender)

(Goldberg, J., in chambers). But even the decision to demand such assurances from a foreign state can raise delicate foreign relations issues. ER 13-14.

Application of the Rule of Non-Inquiry here makes sense in light of the factors involved in extradition surrender determinations, the inherent limits on the ability of courts to adjudicate issues intimately tied to foreign relations, and the fact that the Department of State has put into place appropriate policies and procedures for determining whether a fugitive is more likely than not to be tortured.

The Secretary of State already has the responsibility to ensure that extraditions are legally carried out. In other words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Kin-Hong*, 110 F.3d at 111; see *Munaf*, 553 U.S. at 702. Trinidad's argument wrongly assumes that the Secretary will seek to extradite someone to face torture, but the courts have long recognized the presumption that the decisions of

government officials are made in good faith. *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926); see also *Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007). In the present case, the procedures established by the Secretary render such a presumption particularly appropriate.

In sum, in *Lopez-Smith*, this Court reaffirmed the Rule of Non-Inquiry, and refused to grant a habeas writ to stop an extradition despite the petitioner's contention that the legal procedures and punishment he faced in Mexico after extradition were "antipathetic" to the Court's "sense of decency." 121 F.3d at 1326. The Court here should again reaffirm the Rule of Non-Inquiry and reverse the grant of the habeas writ no those grounds.

C. Neither the Torture Convention Nor the FARR Act Overturned the Rule of Non-Inquiry so as to Provide for Judicial Review of the Secretary's Surrender Determinations.

The *Cornejo I* panel majority cited the holding from *Lopez-Smith* to the effect that no judicial review of the Secretary of State's extradition surrender order is available. See 218 F.3d at 1010. Nevertheless, the panel opined that the FARR Act made the Secretary's extradition

surrender decisions justiciable because that statute placed a non-discretionary duty on the Secretary not to extradite fugitives if she finds it is more likely than not that they will be tortured. *Cornejo I*, 218 F.3d at 1014. In fact, no such justiciability rule can be based on the FARR Act.

1. Trinidad has contended that Article 3 of the Torture Act prohibits the extradition of a person who more likely than not will be tortured, and that the FARR Act creates a duty on the part of the Secretary of State to implement that prohibition. While these contentions are correct, neither of those instruments makes justiciable the Secretary's surrender determination which is exclusively within the province of the Secretary of State.

The text of the FARR Act contradicts any notion that Congress intended to radically alter the law and abruptly create judicial review of extradition surrender determinations by the Secretary of State. To the contrary, as described earlier, the FARR Act states that "[n]otwithstanding any other provision of law * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture Convention] or this section * * * except as part of the

review of a final order of removal [in immigration cases]." 8 U.S.C. 1231 note, Sec. 2242(d).

This clear statutory text establishes that Congress did not override the Rule of Non-Inquiry and surreptitiously through the FARR Act make extradition surrender decisions justiciable. See also H.R. Conf. Rep. No. 105-432, at 150 (1998) ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). Rather, the FARR Act provided for jurisdiction over claims under the Torture Convention only in review of final immigration removal orders. See *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005). No such removal order is at issue here.

In view of the clear statutory wording of the FARR Act, the dictum in *Cornejo I* that this language only "prohibits courts from reading an implied cause of action into the statute" (218 F.3d at 1015) is mistaken. The FARR Act language manifestly provides that the statute creates no jurisdiction for judicial review of an extradition surrender determination by the Secretary of State.

Based on this language, the Fourth Circuit has held that Section

2242(d) of the FARR Act "flatly prohibits" courts from considering Torture Convention and FARR Act claims on habeas review. *Mironescu*, 480 F.3d at 673-77. The court closely analyzed the text of Section 2242(d), and found that it does not permit habeas review of a Torture Convention claim in the extradition context. The Fourth Circuit also noted that this reasoning applies as well to attempts to seek review through the Administrative Procedure Act. *Mironescu*, 480 F.3d at 677 n.15.

In addition, the regulations promulgated by the Department of State under the express authority of the FARR Act firmly support the proposition that nothing in that statute established a new right to judicial review of extradition surrender determinations. On their face, the regulations indicate that there is no judicial review of the Secretary's extradition surrender decisions. See 22 C.F.R. 95.4 ("[N]otwithstanding any other provision of law * * * nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section

242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings").

Especially in light of Congress's explicit delegation to the Secretary of State the authority to "implement" the obligations of the United States under the Torture Convention, these State Department regulations deserve substantial deference as published agency interpretations of the FARR Act. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where there has been a Congressional delegation of administrative authority, courts must defer to reasonable agency interpretation).

The language of the FARR Act and the State Department implementing regulations demonstrate that the FARR Act did not suddenly and silently make justiciable the extradition surrender determinations by the Secretary, contrary to the longstanding Rule of Non-Inquiry.

D. The Administrative Procedure Act Provides No Basis for Reviewing the Secretary's Extradition Surrender Determination.

Trinidad is in error when he claims that a habeas action utilizing the

Administrative Procedure Act can serve as the basis for judicial review of an extradition surrender decision by the Secretary of State. He ignores the provisions in the Administrative Procedure Act that explicitly provide that the statute does not apply when judicial review is otherwise not appropriate.

The Administrative Procedure Act (5 U.S.C. 701 through 706), waives the Federal Government's immunity from certain suits challenging administrative agency action and seeking relief other than money damages. 5 U.S.C. 702. The statute provides that a reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 5 U.S.C. 706(2)(A).

Trinidad has contended that his extradition would violate law and policy of the United States because he will face torture upon his return to the Philippines, and the Secretary's decision to surrender him for extradition him is thus unauthorized. But, the Administrative Procedure Act provides no authority for enforcement of Article 3 of the Torture Convention in a U.S. court.

The Administrative Procedure Act does not apply to the extent that "statutes preclude judicial review" (5 U.S.C. 701(a)(1)). As shown at length above, the REAL ID Act expressly precludes judicial review of Torture Convention claims except (with one irrelevant exception) for those asserted in a petition for review of a final order of removal in an immigration proceeding. 8 U.S.C. 1252(a)(4). This preclusion applies "notwithstanding *any* other provision of law." *Ibid.* (emphasis added). Section 1252(a)(4) therefore applies notwithstanding the Administrative Procedure Act, and it precludes judicial review of Trinidad's Torture Convention claim asserted under that statute.

The federal courts' repeated application of the Rule of Non-Inquiry also constitutes a "judicial history" behind the federal extradition surrender statute (18 U.S.C. 3186), that forecloses review of determinations by the Secretary under that statute regarding the surrender of a fugitive, including consideration of claims about the treatment of a fugitive after extradition. See *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) (Administrative Procedure Act review is foreclosed by virtue of "the collective import of legislative and

judicial history behind a particular statute [or] by inferences of intent drawn from the statutory scheme as a whole").

In addition, judicial review of Trinidad's claim in this case is precluded under 5 U.S.C. 702(1), which states that the Administrative Procedure Act's judicial review provision does not affect "other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." This provision incorporates not only express preclusions of judicial review, but also implied preclusions regarding foreign affairs matters such as extradition surrender decisions, which are entrusted to the political branches of government. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158-59 (D.C. Cir. 1999) (finding consular visa decisions to be interwoven with foreign relations, and therefore largely immune from judicial review pursuant to 5 U.S.C. 702(1)); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (it would be an abuse of discretion to grant relief under the Administrative Procedure Act where the court would be required to intercede in sensitive foreign affairs matters).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and Trinidad's second petition for writ of habeas corpus should be denied and dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionally spaced, has a serif type face (Century Schoolbook) of 14 points, in Wordperfect X4, and contains 13,793 words, according to the word processing system used to prepare this brief. I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions.

April 1, 2011

/s/Douglas Letter
Douglas Letter
Counsel for Appellant

STATEMENT OF RELATED CASES

We are not aware of any related cases in this Court.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing En Banc Brief for Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2011.

All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Douglas Letter

DOUGLAS LETTER
Attorney for Appellant

STATUTORY ADDENDUM

TABLE OF CONTENTS

Pub.L. 105-277, Div. G, Title XXII, § 2242, Oct. 21, 1998, 112 Stat. 2681-822, provided that:

"**(a) Policy.**--It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

"**(b) Regulations.**--Not later than 120 days after the date of enactment of this Act [Oct. 21, 1998], the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

"**(c) Exclusion of certain aliens.**--To the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, the regulations described in subsection (b) [of this note] shall exclude from the protection of such regulations aliens described in section 241(b)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1231(b)(3)(B)).

"**(d) Review and construction.**--Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section [this note] shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section [this note], or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252).

"**(e) Authority to detain.**--Nothing in this section [this note] shall be construed as limiting the authority of the Attorney General to detain any person under any provision of law, including, but not limited to, any provision of the Immigration and Nationality Act [Act June 27, 1952, c. 477, 66 Stat. 163, which is classified principally to this chapter (8 U.S.C.A. § 1101 et seq.)].

"**(f) Definitions.--**

"**(1) Convention defined.**--In this section [this note], the term "Convention" means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984.

"**(2) Same terms as in the Convention.**--Except as otherwise provided, the terms used in this section [this note] have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."

Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part V. Adjustment and Change of Status (Refs & Annos)
→ **§ 1252. Judicial review of orders of removal**

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 209. Extradition (Refs & Annos)
§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 209. Extradition (Refs & Annos)
§ 3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

Code of Federal Regulations Currentness
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter J. Legal and Related Services
Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

§ 95.1 Definitions.

(a) Convention means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, entered into force for the United States on November 10, 1994. Definitions provided below in paragraphs (b) and (c) of this section reflect the language of the Convention and understandings set forth in the United States instrument of ratification to the Convention.

(b) Torture means:

(1) Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(4) This definition of torture applies only to acts directed against persons in the offender's custody or physical control.

(5) The term "acquiescence" as used in this definition requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(6) The term "lawful sanctions" as used in this definition includes judicially imposed sanctions and other enforcement actions authorized by law, provided that such sanctions or actions were not adopted in order to defeat the object and purpose of the Convention to prohibit torture.

(7) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.

(c) Where there are substantial grounds for believing that [a fugitive] would be in danger of being subjected to torture means if it is more likely than not that the fugitive would be tortured.

(d) Secretary means Secretary of State and includes, for purposes of this rule, the Deputy Secretary of State, by delegation.

Code of Federal Regulations Currentness
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter J. Legal and Related Services
Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

§ 95.2 Application.

(a) Article 3 of the Convention imposes on the parties certain obligations with respect to extradition. That Article provides as follows:

(1) No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(b) Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. "is more likely than not" to be tortured in the State requesting extradition when appropriate in making this determination.

Code of Federal Regulations Currentness
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter J. Legal and Related Services
Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

§ 95.3 Procedures.

(a) Decisions on extradition are presented to the Secretary only after a fugitive has been found extraditable by a United States judicial officer. In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.

(b) Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

Code of Federal Regulations Currentness
Title 22. Foreign Relations
Chapter I. Department of State
Subchapter J. Legal and Related Services
Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

§ 95.4 Review and construction.

Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105–277, notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.